It was for the foregoing reasons that I was amply satisfied that the statements contained in the Intervener's affidavits as to the alleged trust aforesaid did not have sufficient *prima facie* plausibility to merit further investigation as to their truth.

Summing up, I posed to myself and answered. the following questions suggested in the oft-quoted case of *American Cyanamid* v. *Ethicon*[5]:

(a) Has the Intervener demonstrated that there is a serious question to be tried?

Answer : No.

(b) Has the Intervener demonstrated that he has a real prospect of success at the trial of establishing his claim to the ownership of the ship "Yih Shen"?

Answer : No.

In view of the answers to the above questions, I did not consider the further questions as to the adequacy of damages for any loss suffered by the Intervener or the adequacy of the undertaking given by the Intervener in the event of any loss suffered by the Plaintiffs or where the balance of convenience lay.

But, had it been necessary to consider the adequacy of the undertaking given by the Intervener, I would, on review, have regarded it as totally inadequate, as he had proved himself to be a most elusive foreigner.

Accordingly, I vacated the *Ex Parte* Orders on the ground that the Intervener had not established a sufficient interest in the cargo, and ordered the usual enquiry as to damages. I was also satisfied, in consequence, that he had no sufficient *locus standi* to intervene, regard being had to the principles enunciated in the case of *Pegang Mining Co., Ltd.* v. *Choong Sam & Ors.*[6]. I therefore made a further order, vacating the Order granting leave to intervene, in order to satisfy the insistent demand for justice.

Lastly, I ordered the Intervener to pay the costs of the application to the Plaintiffs and the Defendants.

Solicitors: *Chang & Vello; Lim Kean Siew & Co.; Dason & Co.; K.S. Choo & Co.*

Order accordingly.

QUAH BAN POH v. DRAGON GARDEN PTE. LTD.

[O.C.J. (Gunn Chit Tuan J.) September 15 to 19, 1984 and December 14, 1984, January 19, 1985]

[Johor Bahru – Civil Suit No. 73 of 1977]

Contract law – Agreement for sale and purchase of house – Time the essence of contract – Uncompleted works to house – Payment under protest – Termination of agreement – Waiver – Specific performance – Damages – Counterclaim for mesne profit.

By a written agreement dated July 20, 1974 the plaintiff purchased from the defendant a double-storey house for $38,500. The defendant was to complete the house on or before December 31, 1975. Time was the essence of the contract relating to payment of money. On November 28, 1975, the plaintiff received a letter from a firm of solicitors representing both parties asking him to take possession of the house and pay the final instalment of $3,850, within a given period. Between that date and April 10, 1976, the plaintiff inspected the house twice and found it not completed and letters were exchanged between the parties. On April 10, 1976, the defendant wrote to the plaintiff informing him that the uncompleted works had been fully remedied and requesting payment of the last instalment of $3,850 or otherwise it would terminate the said agreement. On May 13 the plaintiff sent a cheque for $3,850 to the solicitors paying under protest, and the said solicitors returned the cheque to the plaintiff without the defendant's instructions. On May 18, 1976, the plaintiff and the defendant's architect jointly inspected the house and the latter wrote to the defendant on May 29, 1976 requesting it to remedy the defects and uncompleted works. On September 17, 1976, the defendant wrote to the plaintiff to take over the house and pay the balance of $3,850 immediately. The plaintiff got the keys of the house on September 22, 1976. On October 6, 1976 the said solicitors instructed by the defendant requested the plaintiff to pay immediately the sum of $4,295.96 being last instalment plus interest. But on October 13, 1976 the defendant wrote to their solicitors again instructing them to terminate the said agreement. As instructed by the defendants, the solicitors wrote a letter on October 16, 1976 to the plaintiff to terminate the said agreement forthwith. The plaintiff was asked to deliver vacant possession of the house. On October 20, 1976, the solicitors sent to the plaintiff the defendant's cheque for $26,950 being refund of the monies less sum forfeited. The plaintiff did not pay the cheque into his account and considered the agreement not terminated and still claimed that the defendant had failed to rectify the defects which he was compelled to rectify. He sent to the defendant a cheque for $1,556.85, being the balance less the estimated cost of repairs of $2,293.15. Eventually on February 2, 1977, the plaintiff sued the defendant for damages for breach of contract and for delivery of the relevant issue document of title. The defendant counterclaimed for mesne profit at $800 per month.

Held: (1) the payment of the last instalment of $3,850 by the plaintiff was a tender of the said sum under protest and was therefore a good and valid tender;

(2) the defendant had waived and allowed time of payment of the last instalment to pass. If the defendant had wanted to make time again of the essence of the contract,

it should have given the plaintiff a notice fixing a reasonable time within which he must pay the last instalment. In the solicitors' letter of October 16, 1976, no reasonable time was fixed within which the plaintiff was asked to pay the last instalment. The said agreement was therefore not validly terminated;

(3) the plaintiff was entitled to specific performance of the agreement. The defendant should deliver the document of title and execute a valid and registrable transfer in his favour;

(4) the plaintiff was not entitled to any damages for delay in completion of the house. Damages should be assessed on the basis on which it would cost the plaintiff to obtain performance of the contractual undertaking by a third party. Damages were assessed at $4,586.36 with interest at 8% from date of judgment to date of payment;

(5) as the plaintiff was not a trespasser after he received the letter of October 16, 1976, the defendant's counterclaim for mesne profits was dismissed. The defendant was entitled to payment of the sum of $3850 with interest thereon at 10% as provided for in section 4(7) of the Second Schedule to the said agreement with effect from September 1976 to date of payment. Costs to be paid by each party.

Cases referred to:

(1) *Manning* v. *Lunn* (1845) 2 Car. & Kir. 13; 175 E.R. 6.
(2) *Scott* v. *Uxbridge & Rickmansworth Railway Co.* (1866) L.R. 1 C.P. 596.
(3) *Sweny* v. *Smith* (1869) L.R. 7 Eq. 324; 38 L.J. Ch. 446.
(4) *Greenwood* v. *Sutcliffe* [1892] 1 Ch. 1.
(5) *Sharikat Eastern Plastics Industry* v. *Sharikat Lam Seng Trading* [1972] 1 M.L.J. 21, 22.
(6) *Webb* v. *Hughes* (1870) L.R. 10 Eq. 281 at page 286.
(7) *Wong Kup Sing* v. *Jeram Rubber Estates Limited* [1969] 1 M.L.J. 245.
(8) *Playing Cards (Malaysia) Sdn. Bhd.* v. *China Mutual Navigation Co. Ltd.* [1980] 2 M.L.J. 182.
(9) *Charles Rickards, Ltd.* v. *Oppenheim* [1950] 1 All E.R. 420.
(10) *Mehmet* v. *Benson* (1965) 113 C.L.R. 295, 307.
(11) *Itam bt. Saad* v. *Chik bt. Abdullah* [1974] 1 M.L.J. 221.
(12) *Miliangos* v. *George Frank (Textiles) Ltd.* [1976] A.C. 443, 468.
(13) *Johnson* v. *Agnew* [1980] A.C. 367, 400.

CIVIL SUIT.

L. Parthiban for the plaintiff.
Tia Chak Yik for the defendant.

Cur. Adv. Vult.

Gunn Chit Tuan J.: Quah Ban Poh (the plaintiff) who is an engineer, sued Dragon Garden Pte. (the defendant) for damages for breach of contract and for delivery of the title deed relating to Q.T. (R) No. 2401, MLO No. 2439, Mukim of Plentong, District of Johore Bahru, State of Johore (the said land). The plaintiff had agreed by a written agreement dated July 20, 1974 (see pages 1 – 18 of the Agreed Bundle marked A) to purchase the said land from the defendant together with a double-storey house to be erected thereon for a total purchase price of $38,500/–. Under the said agreement the defendant was to complete the house within a period of 18 months i.e. on or before December 31, 1975.

The events leading up to the institution of this suit on February 2, 1977, were as follows. On November 20, 1975, the plaintiff received a letter (P.2) from M/s Tan & Tan, advocates & solicitors who were representing both parties, notifying him that the house was completed and fit for occupation. He was asked to arrange to take possession of the house and to pay the last and final instalment of $3,850/– within 14 days of receipt of the said letter. The plaintiff also received a copy of an architect's certificate (P.3) signed by one Zainal Abidin Sarajudin (P.W.2) who was employed by the defendant. On receipt of P.2 the plaintiff went to check the house after which he wrote a letter dated December 2, 1975, (P.4) to M/s Tan & Tan attaching a list of uncompleted works which he found during his inspection of the house. On December 24, 1975, the plaintiff received another letter (P.5) from the defendant informing him that the house, was completed and was fit for occupation. The plaintiff went to check the house a second time and found many items missing, as a result of which he wrote to the defendant on January 8, 1976 (P.6) together with a list of uncompleted works and defects in the house. He also requested for a joint inspection of the uncompleted works and defects. Subsequent to that there were other letters exchanged between the plaintiff, the defendant and their solicitors M/s Tan & Tan (P.7 – P.15).

On April 10, 1976, the defendant wrote a letter (P.16) to the plaintiff informing him that the uncompleted works have been fully remedied and requested payment of the last instalment of $3,850/–, or otherwise it would terminate the said agreement. The plaintiff in reply to the defendant's letter of April 10, 1976 (P.16) wrote a letter dated May 13, 1976 (P.19) to M/s Tan & Tan and copied to the defendant informing them that there were still uncompleted works and defects in the house. He however, sent a cheque for $3,850/– (P.20) to the said solicitors as the last instalment

of ten percent for the house subject to a condition that "M/s Tan & Tan will be held responsible if the last payment is made to the developers before the works are completed." But on May 15, 1976, M/s Tan & Tan returned the said cheque to the plaintiff without the defendant's instructions (P.21). However on May 18, 1976, the plaintiff requested the defendant's architect (P.W.2) to inspect the house together with him, and after their joint inspection the plaintiff wrote a letter (P.22) to P.W.2 listing the uncompleted works and defects in the house which were still there when they inspected it. P.W.2 then wrote a letter to the defendant on May 29, 1976, (P.23) requesting it to take necessary action to remedy the defects and uncompleted works.

There was then apparently a period of inactivity for a few months until September 17, 1976, when one John Chang (D.W.1), the chairman of the defendant, wrote a letter (P.24) to the plaintiff requesting him to make arrangements to take over the house and to pay the balance of $3,850/- immediately. The plaintiff went to get the keys of the house on September 22, 1976, and on October 6, 1976, the defendant wrote to M/s Tan & Tan (D.37) requesting them to collect from the plaintiff a sum of $4,295.96 which was the last instalment plus interest chargeable for late payment. M/s Tan & Tan in accordance with the defendant's instructions wrote to the plaintiff on October 6, 1976, (P.25) requesting payment of $4,295.96 immediately. But on October 13, 1976 the defendant wrote to M/s Tan & Tan again (D.38) instructing them to terminate the said agreement. In accordance with the defendant's instructions M/s Tan & Tan therefore wrote a letter on October 16, 1976, (P.26) to the plaintiff to terminate the said agreement *forthwith.* M/s Tan & Tan also asked the plaintiff to surrender vacant possession forthwith as well as the keys of the house to the defendant "failing which the vendors shall commence court proceedings without further notice." On October 20, 1976, M/s Tan & Tan wrote to the plaintiff again (P.27) forwarding a cheque for the sum of $26,950/- from the defendant (P.28) being refund of the monies paid to the defendant "less the sum of $7,700/- being 20% of purchase price being forfeited as liquidated damages pursuant to Clause 16 of the Agreement of Sale dated July 20, 1974." The plaintiff did not pay the said defendant's cheque into his account and considered that as far as he was concerned the said agreement had not been terminated. On October 27, 1976, he again requested P.W.2, the defendant's architect, to go and inspect the said house with him after which he wrote to P.W.2 (P.29) listing the defects which were still present during their joint inspection on the morning of October 27, 1976. The plaintiff had also instructed one Chew Kuan Tin (P.W.3) a contractor to inspect the house and to give a quotation for the cost of remedying the uncompleted works and defects (P.33 and P.34), which I found on the evidence adduced, were still there in October, 1976, despite the architect's letter (P.3) dated September 17, 1975, that the house was "fully completed in accordance to plan and fit for occupation" and the defendant's subsequent letters claiming that the uncompleted works and defects had been "fully remedied". By about the end of October, 1976, the plaintiff also decided to instruct a new firm of solicitors to represent him. His new solicitors, Ong Ban Chai & Co., wrote to M/s Tan & Tan on November 4, 1976, (P.30) in reply to their letters of October 16 & 20, 1976, (P.26 & P.27) to point out that "the defendant had failed to rectify defects in the said house as a result of which the plaintiff was compelled to carry out the necessary repairs for the said house". Ong Ban Chai & Co., as instructed, also forwarded a cheque for $1556.85 (P.33) being the balance of the purchase price less the estimated cost of repairs of $2,293.15. They also returned to M/s Tan & Tan the defendant's cheque for $26,950/- (P.28).

Amongst the various issues raised by both counsel in their submissions, I agreed that the following issues were relevant and had to be considered by the Court in order to determine this suit:-

(a) *Was a tender of payment by the plaintiff under protest a valid tender to the defendant?*

It was firstly the submission of Mr. Tia, counsel for the defendant, that when the plaintiff sent his cheque (P.20) to M/s Tan & Tan on May 13, 1976, he did not send the money either to the defendant or to the defendant's solicitors but to his own solicitors. That contention was rejected by me because it was clear from the evidence that M/s Tan & Tan were acting for both parties on that date. Here one need only remind oneself of the fairly large number of cases in which the courts have pointed out the dangers and the undesirability of the same solicitor acting for both vendor and purchaser which, as in this case, have resulted in trouble for both parties.

Another complaint of counsel for the defendant was that because the plaintiff had imposed an unreasonable condition when he tendered payment of the last instalment that condition was unacceptable to his own solicitors M/s Tan & Tan who therefore rejected it and returned the cheque to him. It was also the contention of Mr. Tia that even if M/s Tan & Tan were considered to be acting for both parties, yet they were correct in rejecting the payment on May 15, 1976, (P.21) and the plaintiff had therefore not made any payment at all on May 13, 1976. In this connection it is necessary to refer to the actual words used by the plaintiff in the following paragraph of his letter of May 13, 1976 (P.19) when he tendered payment of the last instalment:—

"The writer visited the above house on Wednesday May, 12, 1976, and found the uncompleted works plus defects still present. A cheque No. 7801.36 for the sum of $3850/— for my last installment for the house is paid *under protest.* As it had been pointed out in my letters that items of work in the house have not been completed, M/s Tan & Tan will be held responsible if the last payment is made to the Developers before the works are completed."

From the above I considered and found that the payment of the last instalment of $3,850/— by the plaintiff was a tender of the said sum under protest and was therefore a good and valid tender. (See *Manning* v. *Lunn*[1]; *Scott* v. *Uxbridge & Rickmansworth Railway Co.*[2]; *Sweny* v. *Smith*[3]; *Greenwood* v. *Sutcliffe*[4]).

(b) *Was the agreement between the plaintiff and the defendant validly terminated on October 16, 1976?*

It was the contention of Mr. Tia that counsel for the plaintiff, Mr. Parthiban, should not be allowed to question the validity of the notices, particularly P.2, as it was not pleaded specifically in the statement of claim. But the plaintiff in paragraph 9 of the statement of claim did aver that "on October 16, 1976, the defendant through their solicitors, M/s Tan & Tan purportedly terminated the said agreement ...". As regards Mr. Tia's contention that the plaintiff should have pleaded specifically that the notice dated October 16, 1976, (P.26) was bad in law and in fact, I agreed with counsel for the plaintiff that the use of the word "purportedly" in paragraph 9 of the statement of claim was sufficient to show that the plaintiff did not in any way accept the validity of the termination of the agreement and/or the right of the defendant to terminate it. Mr. Tia however submitted correctly that another question the court had to consider was whether by the conduct of the parties and in particular that of the defendant, notice had been waived. But he contended that the right to terminate the agreement subsisted after the plaintiff failed to pay the last instalment within 14 days of the notice dated November 20, 1975, (P.2) and was exercisable at any time after expiry of the stipulated period. He relied on the following clause 15(a) in the said agreement which reads as follows:—

"15. If Purchaser shall:—

(a) fail to pay any of the instalments of the Balance Sum in accordance with the provisions of Clause 10 hereof; or ... it shall be lawful for the Company at any time thereafter to annul the sale of the said land and the said building and to forthwith terminate this Agreement."

He also contended that all the defendant's letters subsequent to the notice of November 20, 1975, (P.2) up to and including his solicitor's letter dated October 16, 1976, (P.26) were valid notices to terminate the said agreement and upon which the defendant might exercise its right to terminate the agreement at any time pursuant to the above-mentioned clause 15. It was therefore his contention that the said agreement was validly terminated on October 16, 1976.

I however agreed with counsel for the plaintiff that in considering the validity of the termination of the agreement, the court had to consider and determine other issues such as whether time was of the essence of the agreement; did the parties by their conduct waive the stipulation as to time being the essence of the agreement, and what was the effect of the waiver of time being the essence of the said agreement?

As regards time being the essence of the agreement, reference must be made to section 4(7) of the Second Schedule to the said agreement which states that instalment payments shall be paid by the purchaser to the company within 14 days of the receipt of notice from the company demanding such payment. Reference must also be made to clauses 10(a) and (b) of the said agreement which provides that:—

'10(a). The Balance Sum as specified in section 3 of the Second Schedule hereto shall be paid by the Purchaser at the times and in the manner as set out in section 4 of the Second Schedule hereto by instalments in the manner and at the times as specified in the said section 4 of the Second Schedule hereto.

(b) Time shall of the essence of the Contract in relation to all the provisions of this Agreement as shall relate to the payment of the Balance Sum or any part thereof."

From the above clauses it is obvious therefore that time was originally to be of the essence of the agreement. But as regards the issue of whether the parties by their conduct had waived the stipulation as to time being the essence of the agreement, reference was made by counsel for the plaintiff to the case of *Sharikat Eastern Plastics Industry* v. *Sharikat Lam Seng Trading*[5] in which Mohd. Azmi J. (as he then was) referred to the following *dictum* of Sir R. Malins V.C. in *Webb* v. *Hughes*[6]:-

"But if time be made of the essence of the contract, that may be waived by the conduct of the purchaser; and if the time is once allowed to pass, and the parties go on negotiating for completion of the purchase, then time is no longer of the essence of the contract. But, on the other hand, it must be borne in mind that a purchaser is not bound to wait an indefinite time; and if he finds, while the negotiations are going on, that a long time will elapse before the contract can be completed, he may in a reasonable manner give notice to the vendor, and fix a period at which the business is to be terminated."

The above *dictum* was also approved by Raja Azlan Shah J. (as he then was) in *Wong Kum Sing* v. *Jeram Rubber Estates Limited*[7] in which His Lordship held that "once time for completion was allowed to pass and the parties went on negotiating, time was no longer of the essence of the contract ..." In this case the defendant could have terminated the agreement on or before December 3, 1975, after sending P.2 to the plaintiff on November 20, 1975. But there was ample evidence to show that the defendant had waived this time stipulation. Although it was the contention of counsel for the defendant that the plaintiff should not be allowed to rely on the waiver which was not specifically pleaded in his statement of claim, yet I considered that both parties knew the case presented by the other, and in fact evidence relevant to this issue was adduced by both parties without objections again by either side, justice therefore required that any substantive issue between the parties should be considered. (*Playing Cards (Malaysia) Sdn. Bhd.* v. *China Mutual Navigation Co. Ltd.*)[8] In fact the defendant's chairman Mr. John Chang (D.W.1) even admitted in cross-examination that "I waived my right to cancel the agreement on December 3, 1975, because I wanted my lawyer to negotiate at a later date." All the evidence, both oral and documentary, therefore showed that the defendant had waived and allowed time of payment of the last instalment to pass.

Finally, the effect of waiver of time being the essence of the agreement was that time became at large. Therefore if the defendant had wanted to make time again of the essence of the contract, it should have given the plaintiff a notice fixing a reasonable time within which he must pay the last instalment; and what is a reasonable time is a question of fact to be decided on the circumstances of each case (*Charles Rickards, Ltd.* v. *Oppenheim*)[9]. In our case, it was understandable that D.W.1, who appeared to be an arrogant man, became impatient with the plaintiff who was knowledgeable about buildings and was also a fastidious man. But in accordance with D.W.1's instructions to his solicitors in his letter of October 13, 1976, (D.38) and in M/s Tan & Tan's letter of October 16, 1976, to the plaintiff (P.26) no reasonable time at all was fixed within which the plaintiff was asked to pay the last instalment of $3,850/-. The said agreement was therefore not validly terminated by the letter (P.26) on October 16, 1976. The situation here was somewhat similar to that in *Wong Kum Sing* v. *Jeram Rubber Estate Limited*[7] which was also a case in which the plaintiff claimed specific performance of an agreement of sale of a rubber estate entered into between him and the defendant. Under the agreement time had been made the essence of the contract, but at the request of the plaintiff the defendants had consented to extension of time for completion on six separate occasions. Eventually the defendants through their solicitors wrote to the plaintiff on November 15, 1967, insisting that the purchase be completed on the same day. Raja Azlan Shah J. (as he then was) held, *'inter-alia'*, that the defendants in that case must give reasonable notice of their intention to abandon the contract if the balance was not paid. His Lordship also held that the notice of abandonment dated November 15, 1967, was not a reasonable notice and the contract had not been terminated; in the circumstances the plaintiff had made out a case for specific performance of the contract. Similarly, as the defendant in this case had not given the plaintiff any reasonable notice at all its solicitors' letter (P.26) to make time again the essence of the contract, the said agreement was therefore not validly terminated by that solicitors' letter of November 16, 1976.

(c) *Was the plaintiff in equity entitled to specific performance of the agreement?*

It was the contention of counsel for the defendant that because the plaintiff was a fastidious man and his entire conduct and behaviour in this case compared to that of the defendant, were unreason-

able, his claim should be dismissed. On the other hand, counsel for the plaintiff contended that even though the plaintiff was fastidious he was not an unreasonable man and was only exercising his rights under the said agreement. Counsel pointed out that the plaintiff was always ready and willing to perform his part of the agreement and did not withold payment of the last instalment but only tendered it under protest. He submitted that the complaints of the plaintiff were legitimate and that he was merely asking the defendant to fulfill its obligations. Although he took possession of the keys to the house on September 22, 1976, he could not occupy it because of the incomplete works and defects which were confirmed by the defendant's own architect (P.W.2). In this context it would be useful to refer to the following passage in the judgment of Barwick C.J. in the Australian High Court case of *Mehmet* v. *Benson*[10]:–

"The question as to whether or not the plaintiff is ready and willing to perform the contract is one of substance not to be resolved in any technical or narrow sense. It is important to bear in mind what is the substantial thing for which the parties contracted and what on the part of the plaintiff in a suit for specific performance are his essential obligations. Here the substantial thing for which the defendant bargained was the payment of the price; and, unless time be and remain of the essence, he obtained what he bargained for if by the decree he obtains his price with such ancillary orders as recompense him for the delay in its receipt. To order specific performance in this case would not involve the court in dispensing with anything for which the vendor essentially contracted. Of course, the plaintiff must not by his unreadiness or unwillingness to perform have disowned his obligation to do so, or abandoned his rights to the benefit of the contract. But it is the essential terms of the contract which he must be ready and willing to perform. He seeks a transfer of the interest in land, the subject of the contract: the counterpart obligation is the payment of the price. In considering the question of the plaintiff's readiness and willingness in this respect in this case there are many factors. His default in paying the instalments of the price, whilst not conclusive, is amongst these factors ...

In my opinion, notwithstanding the defaults of the plaintiff in the payment of the instalments of price, he was not unready or unwilling to perform the contract in its essential terms; specific performance ought to have been granted."

In that Australian case the plaintiff was substantially in arrears for some years and yet he obtained an order for specific performance. In our case the plaintiff was always not unready or unwilling to perform his part of the agreement which had in fact been substantially performed on his part in that he had already paid ninety percent of the purchase price prior to and during the year 1975. As regards the last instalment of ten percent, he did tender it to M/s Tan & Tan, who unfortunately were the solicitors for both parties. M/s Tan & Tan without instructions from the defendant rejected payment of that last instalment by the plaintiff also without having advised the latter before writing their letter of May 15, 1976 (P.21). Having taken into consideration the facts and all the surrounding circumstances of this case, the arguments of both counsel on the various issues raised, and also having regard to the fact that the plaintiff has been in possession of the house for more than eight years since September 22, 1976, I considered that it was equitable that the court should exercise its discretion in his favour and therefore ordered specific performance of the said agreement *i.e.* that the defendant to deliver to him the title deed to the said land and to execute a valid and registerable transfer in favour of him. (*Itam bt. Saad* v. *Chik bt. Abdullah*).[11]

(d) *Was the plaintiff also entitled to damages?*

Mr. Tia submitted briefly on damages and stated that if the plaintiff was entitled to damages, the amount of damages should not exceed the sum stated in the letter of P.W.3 (P.34). Counsel for the plaintiff referred to section 18 of the Specific Relief Act, 1950 (Revised – 1974) which provides that "any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, its performance." That section also provides that if the court decides that specific performance ought to be granted, but it is not sufficient to satisfy the justice of the case, it could also award to the plaintiff compensation in such a manner as the court may direct. Counsel also submitted that there have been breaches of the contract by the defendant in wrongfully terminating it and also in not constructing the house with good workmanship and having used defective materials. He referred to the quotations given by P.W.3 and submitted that the sum of $2,293.15 would be grossly inadequate because the quotations were made in 1976, and referred to P.W.'s evidence that the cost at the present time would be double and submitted that the plaintiff was therefore entitled to a sum of $4,586.30 as damages which should be assessed as on the date the contract was lost and that, according to him, must be the date of hearing of the suit. Counsel then pointed out that the plaintiff had made every attempt to mitigate his damages, and claimed that damages should also be awarded for late delivery of the house which should have been completed and be ready for occu-

pation on November 20, 1975. However as there was no evidence to show what losses the plaintiff had suffered as a direct result of the delay in completion of the house, I did not consider that he was entitled to any damages on that account. In the circumstances of this case I considered that the damages should be assessed on the basis of what it would cost the plaintiff to obtain performance or completion of performance of the contractual undertaking by a third party such as P.W.3. The general rule of course is that damages for breach of contract should be assessed as at the date when the cause of action arose, namely the date of the breach (*Miliangos* v. *George Frank (Textiles) Ltd.*[12]) But this is not an absolute rule and the court has power to fix such other date as may be appropriate in the circumstances. (*Johnson* v. *Agnew*[13]). As there was evidence that the uncompleted works and defects which were in the house when the plaintiff took possession in September 22, 1976, are still there and that it would now cost at least double the amount of the quotation given by P.W.3 to remedy them, I therefore assessed damages at $4,586.36 and also ordered interest at eight percent on that amount from the date of judgment to the date of payment. As I did not consider or find that the plaintiff was in the circumstances a trespasser after he received the letter dated October 16, 1976, from the solicitors M/s Tan & Tan, I therefore dismissed the defendant's counterclaim for mesne profits at the rate of $800/- per month from the date of the alleged trespass. But in the circumstances I considered that the defendant was entitled to and therefore ordered the plaintiff to pay it the sum of $3,850/- i.e. the last instalment of ten percent, together with interest thereon at ten percent as provided for in section 4(7) of the Second Schedule to the said agreement with effect from September 22, 1976, to the date of payment thereof. In the circumstances of this case I also considered that the parties should each pay their own costs and so ordered.

Order accordingly.

Solicitors: *Ong Ban Chai & Co.; Tia & Noordin.*

ABDUL AZIZ BIN ATAN & 87 ORS. v. LADANG RENGO MALAY ESTATE SDN BHD.

[O.C.J. (Shankar J.) December 15, 1984]
[Muar – Originating Motion No. 19 of 1983]

Employment – Sale of shares in company to a buyer – Whether change of employer took place – Claim by employees for termination benefits – Employment Act 1955, s. 69 – Employment (Termination and Lay-Off Benefits) Regulations 1980, reg. 8.

Company Law – Change of shareholders – Whether constituted change of identity of company.

This case concerns the proper application of Regulation 8 of the Employment (Termination and Lay-Off Benefits) Regulations 1980. All the shareholders of the respondent company by a written agreement sold and transferred their entire shares to a certain buyer in 1981. The main asset of the company consisted of land on which the company appeared to have carried on the business of a rubber estate and oil palm. In November 1982, a claim, said to be for April 1982, was initiated under section 69 of the Employment Act 1955 for termination benefits under Regulation 8. The point in dispute was whether the estate was sold and if so whether a change of employer took place.

Held, dismissing the applicants' appeal: an incorporated company is a legal person separate and distinct from the shareholders of the company. In the present case there was no change whatsoever in the constitution of the respondent company. The company did not change its identity or personality. It continued to own all the assets of the estate which were an integral part of the business for the purposes for which the applicants were employed.

Cases referred to:

(1) *Kumpulan Kamuning Sdn. Bhd.* v. *Rajoo & Ors.* [1983] 2 M.L.J. 400.
(2) *Association Motor Industries (M) Sdn. Bhd.* v. *Thangaraju a/l Poomie.* Judgment dated October 28, 1983 in Kuala Lumpur High Court Originating Motion No. A44 of 1982 *(unreported).*
(3) *Dallow Industrial Properties Ltd.* v. *Else* [1967] 2 All E.R. 30, 33.
(4) *Woodhouse & Anor.* v. *Peter Brotherhood Ltd.* [1972] 3 All E.R. 91.
(5) *Cameron* v. *Hector Finlayson & Co. Ltd.* [1967] I.T.R. 110.
(6) *Wright* v. *Charlton Concrete Co. Ltd.* [1967] I.T.R. 72.

[The following cases were also cited in argument: *Alembic Chemical Works* v. *Workmen* A.I.R. 1961 S.C. 647, 649; *Goli Eswariah* v. *Comm. of Gift Tax* A.I.R. 1970 S.C. 1722; *Carter* v. *Carter* [1896] 1 Ch. 62; *Re Leven etc.* [1954] 3 All E.R. 81; *Inland Revenue Comm.* v. *Buchanan* [1958] Ch. 289; *Ho Kean* v. *Kong Lai Soo* [1974] 2 M.L.J. 63; *How Paik Too* v. *Mohideen* [1968] 1 M.L.J. 51; *Tio Chee Chuan* v. *Khoo Siak Chiew & Ors.* [1967] 2 M.L.J. 20; *Lloyd* v. *Brassey* [1969] 1 All E.R. 382].